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IN THE

Supreme Court of the United States

October Term, 1966

Nos. 593 and 594

FRANCES KAHN and ISRAEL SCHAWARTZBERG,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRITS OF CERTIORARI

PETITIONS FOR REHEARING

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The respective petitions for a writ of certiorari in the above captioned matter were denied by order of this Court dated November 14, 1966.

Grounds for Rehearing

With deference to this great Court, due to the closeness of dates between the Court's consideration of the certiorari petitions and petitioner Kahn's Reply Brief it is apparent that this Court decided to deny certiorari prior to its receipt of the Reply Brief. This case is of the utmost importance and of great interest not only to the legal profession throughout the land but to the public as well. The denial of certiorari herein will grant a license to prosecutors throughout the country to eavesdrop upon conversations between attorneys and their clients and will

further grant the prosecutors *carte blanche* to import illegal and unconstitutional evidence before a body of Grand Jurors. It is respectfully and strenuously urged that this Court should exercise its supervisory powers over the administration of federal criminal justice in the instant case.

Petitioner Kahn received an acknowledgment from the Clerk of this Court dated November 15th, to the effect that her Reply Brief had been received. The Court's decision denying certiorari was dated November 14th, and of course, its decision was made prior thereto. Therefore, it is conceivable that this Court reached its decision to deny certiorari perhaps overlooking the salient points, *infra*. In the Reply Brief petitioner Kahn stressed the fact that the Solicitor General admitted, for the first time, that the eavesdropping tapes existing between petitioner Kahn and client Charles Hedges were divulged and played for the benefit of the Grand Jury in order to obtain the indictment against her. When the Solicitor General submitted his opposing Brief the said admission was artfully drawn and almost escaped the attention of petitioners. At first blush it would appear that the Solicitor General was not confessing the production of the tapes before the Grand Jury when we read its statement at p. "9" of their Brief:

> "Even *assuming, arguendo,* that the *recordings were incompetent evidence. . . .*"

The Solicitor General did not assume *"arguendo"* that the tapes were played before the Grand Jury but instead artistically stated "that the recordings were incompetent evidence", *supra*. The case of *Costello* v. *United States,* 350 U. S. 359 was not the intendment of this Court to permit the prosecution to import illegal and unconstitu-

tional evidence in order to find an indictment. Of significance is the fact that petitioners herein have consistently maintained such tapes were imported into the Grand Jury room but the prosecution below has steadfastly disclaimed our contention (please see petitioner Kahn's Reply Brief for the full treatment on this point). Since the Solicitor General's admission nearly went unnoticed insofar as petitioners are concerned then it is highly possible such admission escaped the Court's attention and was overlooked.

This is especially so when one considers the fact that petitioner Kahn stated in her Reply Brief p. 1 that:

> "The Government admits for the first time that the eavesdropping tapes between petitioner and her client at the Westchester County Jail was used before the Grand Jury in this case" [citing Government's Brief, p. 9].

The Solicitor General did not overcome petitioner's Reply Brief wherein she charged, as she did from the inception of the indictment, that electronic eavesdropping was used before the Grand Jury in order to obtain the indictment (see pp. 1-11 inclusive of her Reply Brief). Petitioner stated therein that the Solicitor General admitted using the tapes before the Grand Jury while the prosecutors in the Courts below denied such use and divulgence of said tapes.

It should be noted that after the petitions for certiorari herein were denied by this Court, petitioner Schawartzberg moved the District Court for a writ pursuant to Title 28, §2255, United States Code, alleging the eavesdrop tapes referred to, *supra,* were illegally and unconstitutionally utilized before the Grand Jury.

The indictment found in petitioners' case is distinguishable from *Costello* v. *United States,* 350 U. S. 359. The

evidence before the Grand Jury in *Costello* was competent although based on hearsay testimony while in petitioners' case the evidence before the Grand Jury was illegal since the indictment was bottomed upon the introduction of illegal and unconstitutional tapes as evidence which the Grand Jury had no right to consider.

The conferences between petitioner Kahn and Hedges were surreptitiously intercepted by law enforcement officials through concealed electronic monitorial devices built into the Westchester County Jail where her client was serving his federal sentence. *Black* v. *United States,* a comparable situation; cf. *Davis* v. *United States,* both reported in 35 LW 3164, should point up petitioner Kahn's case as one which may have been overlooked by this Court due to the voluminous record and extensive petitions for certiorari filed herein.

The Civil Liberties Union of the City of New York has written petitioner Kahn a letter stating it would file a brief *amicus curiae* if the petition for certiorari would be granted. The aforesaid civil libertarians also appeared for petitioner Kahn on the pre-trial motion to suppress the eavesdropping tapes in question.

Petitioners vehemently urge this Court to reconsider its denial of certiorari on another point, to wit: the reversal in the case of *Black* v. *United States,* decided November 7th, 1966, reported thus far as 35 LW 3164.

CONCLUSION

For the reasons set forth above and in the respective petitions for writs of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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ISRAEL SCHAWARTZBERG
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Certificate of Counsel

We hereby certify that the foregoing joint petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Dated: November 18, 1966.

/s/ .....
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